IN THE MATTER OF THE ARBITRATION BETWEEN

ARCELORMITTAL USA
COATESVILLE PLANT

And

ArcelorMittal Case No. 73

UNITED STEELWORKERS
INTERNATIONAL UNION AND
LOCAL UNION 1165, USW

OPINION AND AWARD

Introduction

This case from the Coatesville Plant concerns the Union's claim that the Company failed to modify the incentive plan covering finishing employees, who were no longer able to achieve the 20% earnings opportunity provided for by the plan. The case was tried in Coatesville, Pennsylvania on June 12, 2015. Robert Casey represented the Company and Lew Dopson presented the Union's case. The parties agreed there were no procedural issues and that the case was properly in arbitration. The parties did not agree to the precise wording of the issue on the merits, and stipulated that I could frame the issue. The issue, as discussed in the Findings, is whether a November 2003 document imposed an obligation to adjust the incentive plan if product mix affected the economic opportunity to earn 20% and, if so, whether the Union can show that the reduction in incentive earnings was due to product mix. The parties also agreed that the result in this case will control a second grievance that, like this one, claimed employees were being denied the opportunity to earn a 20% incentive rate. The second grievance was filed in the fourth quarter of 2011, and the Company said the Union did not need to keep filing grievances when the plan paid less than 20%. They agreed that this case will resolve both grievances, and that it applies to all of the quarters since the time of the initial grievance, which was during the fourth quarter of 2010. The parties submitted the case on final arguments.

Background

I addressed some of the history of the incentive plans in effect at the Coatesville Plant in ArcelorMittal Case No. 25:

> The ArcelorMittal Coatesville Plant was formerly a unit of Bethlehem Steel. ISG, a predecessor of ArcelorMittal, purchased certain assets of Bethlehem, and the former Bethlehem locations came under the umbrella of the ISG-USWA December 15, 2002 Agreement as of June 16, 2003.... One part of the contract existing in 2003 was headed "Incentive Plans" and concerned certain understandings between the parties about incentive plans at former Bethlehem locations.
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> Under Paragraph D of the Incentive Plans Memorandum of Understanding (MOU), the parties agreed that
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>> Effective with the date of the closing, the parties have agreed to preserve the same incentive earnings for each employee at the level of performance that he or she had in a representative period ... prior to the closing. In addition, such protection shall include such things as red circled rates, personal incentive additives, and personal out of line differentials....
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> There were apparently more than one hundred incentive plans under the Bethlehem-USWA relationship. The MOU also provided for the creation of a Corporate-wide Incentive Task Force that was to develop and implement, only after securing mutual agreement, new incentive plans to achieve the following objectives:
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> 1. A significant reduction in the number of incentive plans;
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> 2. Incentive pay that is a percentage addition to the base rate of pay of each employee (discontinuation of the ICR);
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> 3. An average incentive opportunity of 20% above the Employee's Base Rate of Pay.

The Coatesville plans became effective on November 16, 2003. More information about the Coatesville Finishing and Shipping Incentive Plan was presented at the hearing by Joseph Kurtz who, in 2003, was Manager of Finishing and Shipping. Kurtz said he designed and developed the plan, and that the philosophy was to be fair both to employees and the Company; to create an incentive for employees to be more productive; and to pay well for productivity improvement.

Among the considerations in adopting the plan, Kurtz said, were product types, product mix, tons produced, and tons shipped. Kurtz also said the plan was designed to provide the same earnings opportunity regardless of the products the Company ran. The plan at issue provides for a 20% earnings opportunity. A Company exhibit showed that meeting the earnings opportunity was not an issue from the fourth quarter of 2003 through the fourth quarter of 2008. During that period the incentive earnings were at or above 20% (and as high as 51%) in all but two quarters, one of which came in at 19.99%. The yearly average in that period was always above 29% and, in two years, above 30%.

The recession that began in late 2008 had a severe impact on the Company and most of the rest of the steel industry. Even so, in 2009 the average finishing incentive was 20.57%, down considerably from the 29% average in the three previous years, but still above the 20% standard. Similarly, the yearly average for both 2010 and 2011 was over 21%, with quarterly averages ranging from 18.49% to 25.96%. The Union points out, however, that the finishing employees did not reach 20% for eleven consecutive quarters, beginning in the fourth quarter of 2011 and extending through the second quarter of 2014. The yearly average in 2012 was 18.17% and in 2013 it was 17.95%. Performance improved in the last two quarters of 2014, making the yearly average 20.76%. The fourth quarter of 2014 was 25.16% and the first quarter of 2015 was 23.86%.

The parties agree that the 20% level for the finishing plan is not a guarantee; rather, the plan must give employees an opportunity to reach an average of 20%. The Agreement includes a provision about steps to take when a plan does not provide that earnings opportunity. Article 9-B-2 says, in relevant part:

> The Company shall also modify existing incentive plans where new or changed conditions resulting from mechanical improvements made by the Company in the interest of improved methods or products, or from changes in equipment, manufacturing processes or methods, materials processed, or quality of manufacturing standards impact the earnings opportunity provided under an existing incentive plan. In all other circumstances, existing incentive plans remain unchanged....

Although the grievances at issue in this case cited a violation of Section 9-B, at the arbitration hearing the Union said it does not claim that a changed condition under Section 9-B-2 required the Company to modify the plan. Instead, the Union relies on a 2003 document it calls a Memorandum of Understanding, sent from John DeMarco, then the Manager of Human Resources and Labor Relations, to Bob Hamscher on November 21, 2003.

The memorandum appears to summarize discussions concerning implementation of the finishing incentive plan, among others. Hamscher was not identified at the hearing, but ArcelorMittal Case No. 25 – a portion of which is quoted above – says he was “the Incentive Chairman at the Burns Harbor Plant in Indiana,” which, like Coatesville, was a former Bethlehem property. Hamscher was also the Union Chairman of the Corporate-wide Incentive Task Force, which was given the job of developing and implementing the new plans. Attached to the November 21, 2003 document DeMarco faxed to Hamscher were “the agreed incentive plan bulletins for the Coatesville Plant....” The document referenced a discussion between the parties on November 14, 2003, and continued “During our discussion regarding implementation, the parties also agreed to the following items.” The item at issue here says, in relevant part:

> To meet at least quarterly to review and discuss whether employees were provided with the opportunity under the applicable Incentive Plans to receive an average incentive of 20% above the applicable base rate.... During such discussions, the parties also agreed to discuss and make appropriate adjustments to incentive base targets and/or plan designs if desired projected ISG Plate business results are not achieved; for capital or technological advancements and/or due to changes in product mix.

There are numerous industry arbitration awards holding that a change in product mix is not a changed condition warranting modification of a plan pursuant to Article 9-B-2. But, the Union says, the November 14, 2003 memorandum says expressly that the parties would make adjustments "due to changes in product mix." The Union argues that changes in product mix prevented the finishing department employees from having a 20% earnings opportunity.

The Coatesville Plant produces a large number of products, and the parties agree that some are easier to work with than others. According to Dan Brenneman, the Union's Incentive Chairman, changing the mix of products could result in less production and a corresponding reduction in earnings opportunity. If the change in product mix persisted, he said, the employees may not have a realistic opportunity to make 20%, which is why the Union believes the parties agreed in 2003 to take product mix into account in determining economic opportunity.

The Company argues that the reduction in incentive earnings was due to efficiency, not product mix. The Union acknowledges that earnings opportunities increase as man-hours decrease. But, the Union says, that is not the entire story. One method of measuring efficiency is man-hours expended per ton. The Union introduced an exhibit based on man-hours per ton shipped. In 2007, the Company shipped 434,201 tons, which worked out to 1.26 man-hours per ton shipped. That year the finishing plan paid 29.46%. In contrast, in 2014 there were 349,818 tons shipped, with man-hours per ton at 1.28. But even though the man-hours per ton shipped were almost identical to 2007, in 2014 the plan paid 20.76%. This shows, Brenneman contended, that efficiency based on man-hours per ton is not the only factor affecting economic opportunity. The Union says some of the decline in earnings opportunity may have been due to sharply reduced production in 2009, caused by the recession and a steep drop in demand, although even then the plan paid 20.57%. But product mix, the Union says, was also a factor.

During the period between 2007 and 2014, the Union's exhibit shows, the value factors – calculations that are supposed to adjust performance data according to the difficulty of working on a particular product – that paid the highest and gave the highest earnings opportunity had significantly decreased, and were replaced by an increase in lower paying products. The conclusion, the Union says, is that the value factors in 2007 gave employees an opportunity to make a high incentive, and the value factors in play in 2012 and 2013 did not. On cross examination, the Company pointed out that the Union's numbers were based on tons shipped, which accounts for 20% in incentive calculations; the other 80% depends on banked tons, meaning tons produced but not shipped. Brenneman acknowledged that value factors are applied to banked tons, which his calculations did not include. The Union said, however, that it believes the data it tendered were representative of average man-hours per ton.

Brenneman agreed that with the exception of clad, which the Company discontinued in late 2014, the products the Company produced were the same ones it had always produced, with the same value factors. He also said the Company did not have too many employees working in finishing, and he acknowledged that if there is enough work for everyone and if the employees perform within the parameters of the business plan, they will have an opportunity to earn 20%. The Company also pointed out that the employees' yearly average exceeded 20% in all but 2012 and 2013, which showed the employees had an opportunity to earn 20% despite the product mix.

Joseph Chaippini. Division Manager of Rolling and Finishing, said he calculates the finishing incentive payments. The value factors – which are multiplied by tons produced – are intended to standardize the different products so that lower production on high value products does not skew productivity. This means, Chaippini said, that the value factors provide the same opportunity to make 20% regardless of the products. Chaippini also addressed the effect of finishing employees who are assigned to work outside finishing. When that happens, he said, he takes out the hours worked elsewhere so they do not distort the man-hours-per-tons-produced calculation. He also said he sometimes makes "tweaks" when something happens that could distort the process. On cross examination, Chaippini said he believes the drop from nearly 30% incentive to around 20% between 2006 and 2014 was mostly due to efficiency, meaning that the employees needed to work harder to maintain the same kind of earnings.

Albert Fuller, Human Resources and Labor Relations Manager for Coatesville, pointed to a section in the third step minutes in which the former Union President agreed that no modification of the plan was necessary.[1] Fuller also identified a presentation the Company made to the Union concerning how the incentive plan operated. One part of the presentation focused on one week and showed that the incentive percentage would go up significantly if employees simply made one more plate per turn. Fuller also testified that the November 21, 2003 fax from DeMarco to Hamscher was not an issue in this case until the third step meeting in November 2014, about four years after the grievance was filed. Fuller said the document covers the installation of the new incentive plan and summarizes discussions between the parties about the plan. But the memo is not part of the contract or the incentive plan itself. He also said in initial

[1] The Union said the President's comments about no adjustments were tied to his statement that the parties could address the issue in 2015 negotiations.

meetings about the grievance in 2010, the Union did not identify any changed condition as a result of the Company's decision to stop producing clad products.

Positions of the Parties

The Union argues that the 2003 memo from DeMarco to Hamscher was a commitment to "make appropriate adjustments" to the incentive plan if a change in product mix affected the opportunity to make 20%. An opportunity, the Union contends, is defined as a favorable set of circumstances, or as conditions that are favorable for attainment of a goal. But the circumstances are not favorable here, the Union says, because of the change in product mix. The Union does not contest the Company's claim that it makes adjustments when the earnings opportunity changes dramatically; but, the Union says the fact that employees did not achieve 20% for eleven consecutive quarters shows that the plan itself needs to be tweaked.

The Company points to the Union's acknowledgement that the plant was not overstaffed and that the employees had sufficient work. Thus, the Company argues, the fact that production has been reduced does not affect the employees' economic opportunity to make 20%; if the employees meet the business plan, then they will make 20%. The Union relies solely on a product mix theory, the Company says, which other industry arbitrators have recognized is not a condition that warrants modification. That is true here, the Company says, because the plan was designed to pay 20% no matter what products or combination of products the plant ran. And, in fact, the plan has paid an average of 20% in all but two years since it was adopted in late 2003. The Company asserts the Union's real product mix argument is that the reduction and eventual elimination of clad products made it more difficult for employees to earn 20%. But, the Company argues, the change in product mix had no such impact because the other products had value factors to counter the lower production rate. Moreover, the Company says the plan target is 20%, not 30%.

The Company says the Union relies exclusively on the November 2003 memorandum. But that document is not in the contract, and Article 9-B-2 says expressly that if none of the conditions it describes occurs – and the Union said none of them did occur – then, "In all other circumstances, existing incentive plans shall remain unchanged." The 2003 memorandum cannot change that language in the Agreement, the Company says.

Findings and Discussion

The Union's case depends on two arguments: First, that the November 21, 2003 memorandum means the parties agreed to meet and "make appropriate adjustments" if the just-implemented incentive plan did not pay an average of 20% because of product mix. Included in this issue is whether the product mix argument can survive the language of Article 9-B-2, which lists several changed conditions that require modification, none of which, the Union concedes, apply in this case. If the Union carries that burden, the second issue requires the Union to prove that the diminution in incentive earnings during the eleven consecutive quarters in which employees did not achieve 20% was caused by a change in the product mix.

There was not much evidence about the discussions referenced in the 2003 memorandum. In particular, there was no evidence about whether the commitments were intended to survive the term of the 2002 Agreement. The 2002 contract between ISG and the Union became applicable to former Bethlehem facilities, including Coatesville, on June 16, 2003. That agreement contained a section headed Incentive Plans, which included a Memorandum of Agreement – albeit not the November 2003 document the Union says is an MOU. Portions of the incentive agreement in the 2002 agreement are quoted above on page 2 of this opinion, and dealt with the parties' understandings about the negotiations of new plans. The new plans were implemented in 2003.

The incentive Memorandum of Agreement in the 2002 agreement was apparently not carried forward in the 2005 agreement, which recognized the creation of Mittal Steel (now Arcelor Mittal) following the combination of Ispat Inland and ISG. It may be that the language was not retained because by 2005, it had served its purpose of developing new incentive plans. The November 2003 memo was obviously not included in the 2002 agreement since the plans were not negotiated until after the effective date of that contract. But the plans – at least the ones at issue here – were in place as of the effective date of the 2005 contract. Yet, that agreement says nothing about a supplemental understanding concerning changed conditions. Rather, the parties simply retained the Article 9-B-2 language that listed a limited number of changed conditions and then said if none of them occurred, the "existing incentive plans will remain unchanged." One would think that if the parties had agreed to impose a continuing obligation to consider product mix as one of the changed conditions, they would have said so expressly in the first contract negotiated after the 2002 agreement. And this is especially true given the consistent line of arbitration cases holding that a change in product mix was not a changed condition that required modification of a plan. But the agreement does not include any such provision.[2]

However, even if the memorandum survived the three contract negotiations since its inception, I am not persuaded that its terms require an adjustment in this case. It is obvious that

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[2] This analysis is consistent with DeMarco's 2003 memorandum to Hamscher that said the parties agreed to the product mix language as part of "our discussion regarding implementation." This suggests the agreement was intended to address difficulties the plan encountered during the implementation period, and was not meant to be an extension of rights granted under Article 9-B-2.

over a period of a dozen years, the incentive payouts have varied significantly, with quarterly highs sometimes in the 36% to 40% range, to quarterly lows of 16% to 17%. Yearly averages show a similar drop, ranging from 34.30% in 2005 to 17.95% in 2013. Nevertheless, the yearly average fell below 20% only twice, in 2012 and 2013, which covers the eleven consecutive quarters below 20%. It may be that the diminution in clad production had something to do with the decline. A Union witness said the value factors that paid the most were all reduced significantly, an assertion the Company did not rebut. There may be some merit, then, to the Union's argument that the value factors applied to the subsequent range of products did not replace the lost incentive earnings.

But there was no commitment in the plan to keep incentive earnings in the same range as the production of clad product diminished. As the Company argued, the commitment was to allow employees an opportunity to earn 20%, not 30%. There have been quarters since the beginning of 2009 when incentive earnings were between 20% and 25%. The last quarter of 2014, for example, was 25.16%. In these circumstances, it is obvious that the plan gives employees an *opportunity* to earn 20%. Admittedly, it is troubling that the employees failed to earn 20% for eleven consecutive quarters, and were below a 20% yearly average in 2012 and 2013. But I cannot conclude that product mix was the principal cause. Each of the first three quarters of 2011 had incentive earnings of 22%. The eleven consecutive quarters of low earnings began in the fourth quarter of 2011, where the result was 19.06%. But there was no evidence about how the product mix changed between the first three quarters of 2011 and the next eleven quarters, except for the reduction in clad. However, clad was even lower in 2014, when the yearly average was 20.76%, with the third quarter at 20.42% and the fourth quarter coming in at 25.16%. In addition, the first quarter of 2015 was 23.86%.

It may be that with the elimination of clad products, the employees have to work harder to achieve 20%, even taking the value factors into account. But the record demonstrates that the employees have an opportunity to earn 20%. They have done so in more than a few quarters over the past several years and there was no evidence that those quarters were somehow aberrational from the circumstances the employees faced when they earned less than 20%. In sum, while it is understandable that the finishing employees are upset because of a decline in incentive earning from more than 30% to only slightly above 20%, the standard is 20% and the record establishes that even with the change in product mix, the employees had an opportunity to reach that level. Thus, I must deny the grievance.

<u>AWARD</u>

The grievance is denied.

Terry A. Bethel

Terry A. Bethel
August 4, 2015